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CATHY A. CATTERSON
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 03-50018
	)	
Plaintiff-Appellee,	)	D.C. No. CR-01-03211-TJW
	)	
v.	)	**MEMORANDUM**[*]
	)	
HECTOR RIVERA-GALVAN,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court
for the Southern District of California
Thomas J. Whelan, District Judge, Presiding

Argued and Submitted October 10, 2003
Pasadena, California

Before: REINHARDT, FERNANDEZ, and RAWLINSON, Circuit Judges.

Hector Rivera-Galvan appeals his conviction and sentence for importation of methamphetamine and cocaine, and for possession with intent to distribute cocaine. See 21 U.S.C. §§ 841(a)(1), 952, 960. We affirm in part, reverse in part, and remand.

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

(1) Rivera first asserts that his conviction on count 1 should be overturned because that count charged both importation of methamphetamine and importation of cocaine, which made it duplicitous. We agree. Those are separate offenses. See United States v. Vargas-Castillo, 329 F.3d 715, 722 (9th Cir. 2003). Thus, they could not be charged in a single count. See United States v. Ramirez-Martinez, 273 F.3d 903, 913 (9th Cir. 2001).

The count and conviction could have been saved if the government had elected one of the offenses, or if the court had required the jury to agree on each distinct charge. See Ramirez-Martinez, 273 F.3d at 915. Neither one happened here. In fact, the court, essentially, instructed that count 1 was a single crime, and, although separate verdict forms were supplied, the court never told the jury that it must unanimously decide which of the distinct charges Rivera actually committed. Thus, we must reverse as to count 1.[1] See id.

(2) Rivera also claims that his conviction on both counts should be

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[1] That being so, we need not consider whether trial of the two charges should have been severed entirely as far as count 1 is concerned. We are aware of the claim that the methamphetamine charge in count 1 should have been severed from count 2. However, on the record of this case, including the instructions, we cannot say that the joinder was so manifestly prejudicial, unfair and injurious that the district court abused its discretion when it refused the severance. See United States v. Rousseau, 257 F.3d 925, 932 (9th Cir. 2001); United States v. Lewis, 787 F.2d 1318, 1320-21 (9th Cir. 1986).

overturned because the government committed misconduct when it disputed his argument that if there was an innocent explanation, it must be accepted. We disagree. His argument was an incomplete statement of the law, and was misleading. It left out the requirement that the jury accept the evidence and find that it did reasonably permit a conclusion of innocence. See United States v. Grayson, 597 F.2d 1225, 1230 (9th Cir. 1979); United States v. James, 576 F.2d 223, 227 n.3 (9th Cir. 1978). There was no misconduct.

(3) Rivera next claims that the whole indictment should fall because the Grand Jury was misinstructed. But we have previously declared that the selfsame instructions were not unconstitutional. See United States v. Marcucci, 299 F.3d 1156, 1159, 1164 (9th Cir. 2002); see also United States v. Cedano-Arellano, 332 F.3d 568, 573 (9th Cir. 2003). This panel is in no position to reconsider that decision. See Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001); Bell v. Hill, 190 F.3d 1089, 1092-93 (9th Cir. 1999).

(4) Finally, Rivera claims that under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the drug statutes are unconstitutional on their face. We have already determined otherwise. See United States v. Hernandez, 322 F.3d 592, 602 (9th Cir. 2003).

AFFIRMED as to count 2, REVERSED as to count 1 and REMANDED.